No. 17-949

In The Supreme Court of the United States

JOHN STURGEON,

Petitioner,

v.

BERT FROST, IN HIS OFFICIAL CAPACITY AS ALASKA REGIONAL DIRECTOR OF THE NATIONAL PARK SERVICE, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

JUSTIN R. PIDOT
Counsel of Record
Visiting Professor
UNIVERSITY OF COLORADO LAW SCHOOL
Professor of Law
UNIVERSITY OF DENVER STURM COLLEGE OF LAW
2255 East Evans Ave.
Denver, CO 80208
Tel: (303) 871-6168
Fax: (303) 871-6378
jpidot@law.du.edu

AMANDA C. LEITER
Professor of Law
AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW

MICHAEL PAPPAS
Professor of Law
UNIVERSITY OF MARYLAND CAREY SCHOOL OF LAW

(List Of *Amici Curiae* Continues In Appendix)

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Whether the National Park Service has authority to regulate navigable waters that run through federal public lands within National Park System Units in Alaska, and to protect those lands from the potential impacts of water-based activities.

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INTERESTS OF *AMICI CURIAE*

Amici law professors teach and write in the areas of administrative, natural resource, and environmental law and take a professional interest in the development of this Court's jurisprudence in those areas. *Amici* file this brief as individuals and not on behalf of the institutions with which they are affiliated.[1]

SUMMARY OF ARGUMENT

This case is simpler than Petitioner and *Amicus Curiae* State of Alaska suggest. This Court has long recognized the federal government's role in managing public lands for the benefit of all Americans. To play that role, Congress must have authority not only to regulate activities on the public lands, but also to regulate *external* activities that have the potential to impact those lands. Furthermore, Congress may delegate such authority to federal land management agencies like the National Park Service (Park Service). Likewise, Congress exercises broad authority over navigable waters throughout the nation and may similarly delegate that authority to the executive branch.

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[1] The Petitioner provided consent to participation by all *amicus curiae* in a letter on file with the Clerk's office. The Respondent consented to the filing of this brief. *Amici* certify that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than *Amici* made a monetary contribution to the preparation or submission of the brief.

Regardless of any regulatory or proprietary interests that Alaska may possess in the waterways that flow through the Alaska conservation lands, Congress and its delegate the Secretary of the Interior (Secretary), acting through the Park Service, must have authority to regulate water-based activities on the "tens of thousands of miles" of navigable waters that run through Alaska conservation lands, Alaska Amicus Br. at 1, because such activities may severely compromise the values and resources for which Congress designated those lands. To hold otherwise "would place the public domain of the United States completely at the mercy of state legislation." *Camfield v. United States*, 167 U.S. 518, 525–26 (1897).

The implications of such a holding would be sweeping and absurd. Alaska, and Alaska alone, would have the authority to control boat access to federal conservation lands held in trust for the entire American public; to protect those lands from harms stemming from activities on nearby waterways; and to set quotas for fish catch in those waters. Under such an approach, the State could prohibit all boat traffic on waterways within conservation areas, or bar the Park Service from building docks and piers to facilitate federal employees' or the public's access to conservation lands. On the flip side, the Park Service would have no authority to limit hovercraft, oil tanker, or party boat travel through sensitive ecosystems, or to prevent depletion of the stocks of salmon and other fish on which land-based predators within conservation lands depend.

Petitioner and Alaska's approach would also deprive the Alaska conservation lands of federal protection afforded to all other public lands elsewhere in the country. *Outside* the boundaries of the Alaska conservation lands, including *inside* the boundaries of conservation areas in other states, the federal government enjoys broad authority to regulate activities on private property, and on waterways, to protect public lands. Yet Petitioner and Alaska suggest that somehow, by establishing the Alaska conservation areas, Congress stripped the federal government of its otherwise well-understood power to protect those lands from external threats. Under this approach, Alaska conservation lands would be entitled to less federal protection than all other public lands, including lands managed for non-conservation uses within Alaska.

These absurd results flow, Petitioner and Alaska assert, either from basic principles of federalism or from a single sentence in section 103 of the Alaska National Interest Lands Conservation Act (ANILCA). 16 U.S.C. § 3103(c). That sentence addresses "MAPS" and provides, "No lands which, before, on, or after the date of enactment of this Act, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units." *Id.*

Fortunately, this Court need not endorse Petitioner and Alaska's approach, for three independent reasons. First, the water flowing within Alaska's navigable waters is not a "land[] . . . conveyed to the State," and no recognized principle of federalism grants

Alaska the power to negate federal regulation of navigable waters. Indeed, the converse is true. Federal law is the supreme law of the land.[2]

Second, regardless of the nature or extent of Alaska's proprietary interests in the relevant waters, the Park Service enjoys the authority to regulate commerce on navigable waters in National Park System Units, and to regulate water-based activities that could impact the surrounding public lands. Those regulatory authorities rest not on federal ownership of the waters but on the long-accepted roles of the federal government as regulator of interstate commerce and manager of public property—roles that Congress expressly delegated to the Secretary in the context of navigable waters within National Park System Units. Moreover, section 103(c) does not affect the Park Service's exercise of those authorities: By its own terms, section 103(c) does not affect Park Service regulations that apply to all lands (and waters) within the boundaries of Park System Units, irrespective of ownership, because such regulations are not "applicable solely to public lands within such unit."

Third, even if section 103(c) is ambiguous, it should not be interpreted to divest the Park Service of authority to regulate the navigable waters within Park

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[2] We also agree with the United States and *amicus curiae* Alaska Native Subsistence Users Who Rely on Fisheries Resources that federal reserved water rights constitute federal interests that fall within ANILCA's definition of "public lands." *See* Resp't Br. at 32-40; Alaska Native Subsistence Users Who Rely on Fisheries Resources Amicus Br. at section II.A

System Units. Such an interpretation is inconsistent with the purposes for which Congress designated Alaska conservation lands and other allowances Congress made for the special circumstances of Alaska. The solitary sentence on which Petitioner and Alaska seized cannot reasonably be read to create such a significant and far-reaching exemption from ANILCA's conservation purposes.

In sum, Petitioner and Alaska contend that activities on navigable waters within Alaska conservation lands, as well as access to and protection of the surrounding congressionally-designated conservation lands and ecosystems, are subject to the whims of the State, which can prevent the Park Service from fulfilling its congressional mandate to manage those areas for the benefit of *all* Americans. That outcome is untenable.

ARGUMENT

I. PETITIONER AND ALASKA FUNDAMENTALLY MISUNDERSTAND THE RELATIONSHIP BETWEEN STATE AND FEDERAL INTERESTS IN NAVIGABLE WATERS.

Petitioner and Alaska make two independent arguments that the state exercises jurisdiction over the water flowing through Alaska's navigable waterways to the exclusion of the Park Service. First, they argue that under the equal footing doctrine, the water was conveyed to the state at the time of statehood and is

therefore insulated from regulation under section 103(c) of ANILCA. Second, they argue in the alternative that principles of federalism bar the Park Service from regulating navigable waterways within conservation lands.

These contentions misrepresent the nature of federal and state interests in navigable waters in three critical ways. First, no principle of United States water law supports the proposition that a state's ownership of submerged lands beneath navigable waters implies exclusive ownership of the associated water. Second, Petitioner and Alaska's contentions conflict with the well-understood structure of our federal system and rest on a "legal fiction," repeatedly rejected by this Court, of state exclusive ownership of natural resources. Third, state exclusive ownership of the waters flowing through navigable rivers, as distinct from the submerged lands under those rivers, is impracticable and inconsistent with both interstate apportionment of water resources and the segment-by-segment analysis of navigability required to determine title. In short, Petitioner and Alaska's approach threatens to upset governance of navigable waters nationwide.

A. The State did not acquire title to water flowing through navigable waterways under the Equal Footing Doctrine.

Water within a waterway is not owned in the same manner as land. While both federal and state entities may possess overlapping proprietary and regulatory

interests in the water, such as federal reserved water rights and state water allocations, respectively, these interests fall short of exclusive ownership of water while it remains within navigable waterways. *See Fed. Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 247 (1954).

No American or English legal tradition supports Alaska's claim of exclusive ownership. In particular, the two systems of water law in the United States, prior appropriation rights and riparian rights, provide no support for such a theory. *See Colorado v. New Mexico*, 459 U.S. 176, 179 n.4 (1982). The prior appropriation doctrine completely separates water rights from land ownership. *See id.* While the riparian doctrine recognizes that riparian land ownership gives rise to a shared, correlative, usufructuary water right, *see id.*; *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 745 (1950) (discussing the history and nature of riparian rights), such a right is a far cry from a traditional property interest in water within a waterway.

Nonetheless, Petitioner and Alaska argue that Alaska owns the water under the Equal Footing Doctrine, *see* Pet.'s Br. at 27–28, Alaska Amicus Br. at 7–8, which recognizes that at statehood, a state acquires "title within its borders to the beds of waters then navigable." *PPL Montana, LLC v. Montana*, 565 U.S. 576, 591 (2012). But this Court has never stretched the Equal Footing Doctrine to grant states title to the *water* within navigable waterways. This theory of conveyance amounts to a contention that the conveyance of submerged lands implicitly includes an exclusive

proprietary interest in an entirely separate resource, water, simply because the two resources are adjacent. That is akin to an assertion that conveyance of a residential house and lot implicitly conveys an exclusive proprietary interest in the bounding street.

Contrary to Petitioner's suggestion, Pet.'s Br. at 33, the Submerged Lands Act (SLA) does not provide support for Alaska's exclusive ownership of the molecules of water flowing through navigable waterways. As applied to inland navigable waters, the SLA merely codifies state title to submerged lands and recognizes state interests in related "natural resources," such as minerals and fisheries. *See* 43 U.S.C. §§ 1301-15. Notably, the SLA refers to lands and waters separately, granting to the states rights to certain specifically defined "submerged lands," and to "natural resources" within the lands and waters. No provision purports to convey rights in the waters themselves. Furthermore, the definition of "natural resources" does not include "water" and specifically excludes "water power, or the use of water for the production of power." *Id.* § 1301.

Indeed, the SLA also reserves to the United States certain rights, including the right to regulate navigation and commerce. *Id.* § 1311(d) ("Nothing in this subchapter . . . shall affect the use, development, improvement, or control by or under the constitutional authority of the United States of said lands and waters for the purposes of navigation . . . or be construed as the release or relinquishment of any rights of the United States arising under the constitutional authority of Congress to regulate or improve navigation. . . ."); *id.* § 1314(a)

("The United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States and others by section 1311 of this title."). Thus, the SLA reinforces the United States' ongoing authority to regulate navigation and commerce on all navigable waters within Alaska.

The Alaska Supreme Court itself has endorsed this reading of the SLA. Decades after passage of the Act, that court reaffirmed the federal government's "paramount authority" over the navigable waters overlying the submerged lands conveyed by the SLA. *See State v. Bundrant*, 546 P.2d 530, 543 (Alaska 1976).

B. Recognizing exclusive state ownership of instream water would upset the balance of authority in our federal system.

Exclusive state ownership of the water flowing through navigable waterways would interfere with the balance of regulatory authority exercised by the federal and state governments. Both sovereigns exercise authority over distinct aspects of water within

navigable waterways. The federal government's regulatory role includes advancing interests in navigability essential to national and international travel, commerce, and security. *See PPL Montana, LLC v. Montana*, 565 U.S. 576, 591 (2012). Accordingly, this Court has long recognized that navigable waters are subject to the federal navigational servitude as well as to federal commerce clause authority. *See Kaiser Aetna v. United States*, 444 U.S. 164, 173 (1979); *United States v. Rands*, 389 U.S. 121, 122–23 (1967). The federal role also includes coordinating water allocation among the several states, tribes, and federal public lands. *See generally Arizona v. California*, 460 U.S. 605, 608 (1983) (describing the apportionment of Colorado River water among states and tribes). States, for their part, may regulate uses of navigable waters so long as they do so in a manner consistent with federal law, and they may control intrastate water apportionment. *See Tarrant Reg'l Water Dist. v. Herrmann*, 569 U.S. 614, 631 (2013).

The concurrent federal and state regulatory authorities over navigable waters reflect the balance of federal and state power inherent in the federal structure of the United States. To the extent that conflicts arise out of these overlapping regulatory interests in navigable water, our constitutional structure provides a resolution under the Supremacy Clause, U.S. Const. art. VI, cl. 2, and the paramountcy doctrine, which dictate that state interests cannot supersede federal ones. *See PPL Montana*, 565 U.S. at 591 (noting "the paramount power of the United States to control such

waters for purposes of navigation in interstate and foreign commerce").

This Court has repeatedly held that states may not defeat federal authority by declaring exclusive state ownership of water or other natural resources. For example, in *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982), this Court rejected a state's assertion that it owned groundwater and thus could exclude such water from federal regulation of interstate commerce. The state's "public ownership theory" was, however, nothing "but a fiction" and did not displace federal authority under the Commerce Clause. *Id.* at 951. In *Hughes v. Oklahoma*, 441 U.S. 322, 338 (1979), this Court similarly held that states may not restrict interstate commerce in wild animals by declaring them state property, because state ownership of animals in the wild is also a "fiction." *See id.* (discussing additional cases dispelling the fiction of state ownership). These cases stand for the proposition that while states have important interests in natural resources within their borders, they do not "own" these resources as traditional property, and they cannot usurp federal regulatory authority simply by declaring such ownership.[3]

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[3] While state law may define the relative property rights of the state government and its citizens in water or other natural resources, federal law defines the relative rights among the several states and as between the states and the federal government. *Cf. Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 369 (1977) (explaining that federal common law governs application of the Equal Footing Doctrine).

Petitioner and Alaska invoke this same "fiction of state ownership" in their effort to bar application of Park Service regulations to activities on the waterways that run through Alaska conservation lands. Recognizing exclusive state ownership of the water flowing through navigable waterways, however, risks the type of state-by-state exclusion and protectionism that our federal system was structured to avoid. *See, e.g., Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522 (1935) ("Imposts and duties upon interstate commerce are placed beyond the power of a state, without the mention of an exception, by the provision committing commerce of that order to the power of the Congress."). As in *Sporhase* and *Hughes*, Alaska should not be permitted to divest the federal government of authority over navigable waterways simply by claiming that the state owns the water flowing through them.

C. State ownership of navigable waters is inconsistent with interstate water apportionment and segment analysis of navigability for title.

If a state "owned" the water molecules flowing through navigable waters, why would that interest extinguish at a state's boundary or along non-navigable stretches of a waterway? The theory advanced by Petitioner and Alaska provides no answer.

A state cannot assert regulatory authority over, let alone a proprietary interest in, water that has flowed beyond state lines or into the territorial seas. Any

assertion to the contrary would throw interstate water apportionment into chaos. *See, e.g.*, *Arizona*, 460 U.S. at 608. Moreover, states do not own the submerged lands beneath non-navigable stretches of otherwise navigable waters. *See PPL Montana*, 565 U.S. at 593. The "[p]hysical conditions that affect navigability often vary significantly over the length of a river," *id.* at 595, meaning that the submerged lands beneath a waterway may shift rapidly among federal, state, and private ownership. The state has no coherent ownership interest in water that may soon course over lands owned by other parties or flow into another state.

Alternatively, if Alaska claims only temporary (that is, partial) "ownership" of navigable waters passing through the state, property law offers no basis for the exclusive authority that Alaska seeks to exercise here. Nothing about temporary or partial ownership negates concurrent federal usufructuary and regulatory interests. On the contrary, the partial nature of such a state interest highlights the need for concurrent federal management of transitory interstate resources.

II. THE PARK SERVICE HAS AUTHORITY TO REGULATE NAVIGABLE WATERS THAT RUN THROUGH ALASKA CONSERVATION LANDS, REGARDLESS OF WHO HOLDS TITLE TO THOSE WATERS.

This case need not, however, turn on this Court's assessment of who owns the water flowing through the Nation River. Regardless of who holds title to that

water, neither federalism principles nor ANILCA section 103(c) authorize Petitioner to operate a hovercraft on that River in contravention of Park Service regulations. Congress has constitutional authority to regulate navigable waters regardless of whether they are federal property, and it has delegated authority over all navigable waters within the boundaries of National Park System Units to the Secretary and his agent the Park Service. Because the Park Service's regulations apply irrespective of ownership, they are not "solely applicable to public lands," and therefore do not fall within the literal terms or any sensible understanding of ANILCA section 103(c). 16 U.S.C. § 3103(c).

A. The Property and Commerce Clauses vest Congress with broad authority to protect public lands and regulate navigable waters.

As discussed in part I, Alaska holds at most a partial interest in the navigable waters that run through Alaska conservation lands. The Court need not resolve the extent of that interest, however, because longstanding precedent establishes two relevant spheres of federal government authority: authority under the Property Clause, U.S. Const. art. IV, § 3, cl. 2, to regulate activities on state and private property to protect public lands, and authority under the Commerce Clause, *id.* art. I, § 8, cl. 3, to regulate activities on and uses of navigable waters throughout the nation.

With respect to the first sphere of authority, Congress holds public lands in trust for the American people. *See United States v. Trinidad Coal & Coking Co.*, 137 U.S. 170 (1890). To effectuate that trust, the Property Clause vests Congress with power to manage and control public lands and their uses in much the way that any property owner exercises dominion over her property. But Congress also has a broader "police power" to regulate non-federal property provided such regulation is directed to the "protection" of public lands. *Camfield*, 167 U.S. at 525–26; *see also Kleppe v. New Mexico*, 426 U.S. 529, 540 (1976) ("Congress exercises the powers both of a proprietor and of a legislature over the public domain.").

Indeed, this Court has never found Congress to exceed its authority to protect public lands from external threats, and has upheld laws that prohibit non-federal property owners from erecting fences that enclose public lands, *Camfield*, 167 U.S. at 528 (construing Unlawful Inclosure Act, codified at 43 U.S.C. § 1061), kindling unattended fires near forests on public lands, *United States v. Alford*, 474 U.S. 264, 267 (1927) (construing criminal statute codified at 18 U.S.C. § 1856), or gathering wild horses that stray from public lands, *Kleppe*, 426 U.S. at 545–47.

Lower courts, too, have consistently sustained limitations on "conduct off federal land that interferes with the designated purposes of" public lands, *Minnesota v. Block*, 660 F.2d 1240, 1249–50 (8th Cir. 1981), including hunting, *United States v. Stephenson*, 29 F.3d 162, 163–64 (4th Cir. 1994); *United States v. Brown*,

552 F.2d 817, 821–22 (8th Cir. 1977); *Bailey v. Holland*, 126 F.2d 317, 324 (4th Cir. 1942), snowmobiling and motor boating, *Block*, 660 F.2d at 1249–50 (8th Cir. 1981), delivery and retrieval of rented watercraft, *Free Enters. Canoe Renters Ass'n of Mo. v. Watt*, 711 F.2d 852, 856 (8th Cir. 1983), construction of docks, *High Point, LLP v. Nat'l Park Serv.*, 850 F.3d 1185, 1189 (11th Cir. 2017), and access to privately owned minerals, *Dunn-McCampbell Royalty Interest, Inc. v. Nat'l Park Serv.*, 630 F.3d 431, 442 (5th Cir. 2011).

Uses of waterways that run through public lands have obvious and direct impacts on the surrounding lands. Driving a hovercraft, speedboat, or oil tanker along a river may disturb wildlife, impair natural vistas, erode banks, or interrupt solitude. Congress's power under the Property Clause, therefore, amply supports regulation of such uses on waterways that cross public lands, regardless of who holds title to those waters.

Congress's second relevant sphere of regulatory authority derives from the Commerce Clause. As this Court has recognized, that clause grants the federal government "pervasive . . . authority" over navigable waters. *Kaiser Aetna*, 444 U.S. at 173. The most familiar facet of this authority is the regulation of navigation itself, but the authority also extends to other national purposes, such as "[f]lood protection [and] watershed development[;] . . . The point is that navigable waters are subject to national planning and control in the broad regulation of commerce granted the Federal Government." *United States v. Appalachian Elec.*

Power Co., 311 U.S. 377, 308 (1940). Indeed, "the power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government." *Gibbons v. Ogden*, 22 U.S. (Wheat) 1, 190 (1824).

In sum, although Alaska suggests that allowing the federal government to regulate activities on navigable waters in Alaska conservation lands would "usurp traditional state sovereignty," Alaska Amicus Br. at 19, it is instead the State that seeks to usurp traditional federal authority to protect public lands from external threats and to regulate navigable waters. The Supremacy Clause directs that if a state law related to public lands or navigable waters conflicts with legislation enacted by Congress—or with regulations promulgated by federal agencies acting within the scope of properly delegated authority—then the state law is preempted. *See City of New York v. F.C.C.*, 486 U.S. 57, 63 (1988); *Kleppe*, 426 U.S. at 543.

B. Congress properly delegated Property and Commerce Clause authorities over navigable waters that run through National Park System Units to the Secretary of the Interior and his agent the National Park Service.

Congress properly exercised its authority under the Property Clause and Commerce Clause to charge the Secretary of the Interior (and his agent the Park Service) with regulating navigable waters that run

through National Park System Units. Public Law 94-458, 90 Stat. 1939 (Oct. 7, 1976), which accomplishes the delegation, implicitly recognizes the many interconnections between the lands and waterways within those units. The delegation therefore includes broad language authorizing the Secretary to "prescribe regulations . . . concerning boating *and other activities on or relating to* water located within [National Park] System Units, including"—but notably not limited to—"waters subject to the jurisdiction of the United States." *Id.* § 2, codified at 54 U.S.C. § 100751(b) (emphasis added).[4]

Nothing in the text of that delegation expressly identifies the constitutional source of the authority Congress exercised. Other congressional actions related to National Park System Units, however, strongly suggest that Congress intended the Park Service to wield both Property Clause and Commerce Clause powers.

First, with respect to the Property Clause, the broad delegation in Public Law 94-458 parallels other instances in which Congress has granted the Secretary authority to protect public lands in the National Park System from both internal and external threats to the conservation values for which the lands were designated. For example, Congress has authorized the

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[4] Congress directed that such regulations "shall be complementary to, and not in derogation of, the authority of the Coast Guard to regulate the use of waters subject to the jurisdiction of the United States." Pub. L. 94-458 § 2, codified at 54 U.S.C. § 100751(b).

Secretary to regulate mining and solid waste disposal within the boundaries of National Park System Units, regardless of whether those activities occur on the public lands. *See* 16 U.S.C. § 459d-3(a) (regulation of "mining and removal" of reserved minerals); 54 U.S.C. § 100903(a) (regulation of solid waste disposal "within the boundaries of any System unit"). Similarly, Congress has subjected "any person that destroys, causes the loss of, or injures any System unit resources" to liability, regardless of where her activity occurred. 54 U.S.C. § 100722.[5] These examples suggest that the Park Service's authority to regulate waters that run through National Park System Units rests at least in part on an understanding that the threats to those units could come from *external* water-based sources, and therefore that the Park Service's authority should not be limited to waters to which it holds clear and exclusive title.

Other past congressional and Park Service actions, however, suggest a shared understanding that the Park Service also wields delegated Commerce Clause authority over certain navigable waters. Specifically, Congress charged the Park Service with managing congressionally-designated wild and scenic rivers, 16 U.S.C. § 1271(c) (designating "[a]ny component of the national wild and scenic river system" administered by the Park Service as a component "of the national park system"), even though those rivers often

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[5] These provisions supplement the Secretary's general authority to issue regulations "for the use and management of [National Park] System units." 54 U.S.C. § 100751(a).

run through significant stretches of non-federal lands. *See, e.g.*, 16 U.S.C. § 460m (designating Ozark National Scenic Riverways); S. Rep. No. 575, 88th Cong., 1st Sess. (1963) 9 (letter from Secretary of the Interior) (explaining that the federal government owned only 800 of the 94,000-acres included in the designation). To manage those rivers, the Park Service must regulate the waters themselves, often without relying on any external threat to surrounding public lands.

Indeed, in a letter to Congress in support of Public Law 94-458, the Secretary recognized that managing National Park System resources must rest in part on Commerce Clause authority. The letter explains that there has been "a phenomenal increase in recreational boating and other water-related activities that affect the resources of many areas of the National Park System." S. Rep. No. 94-1190, 94th Cong., 2d Sess. 11 (1976) (letter from Secretary of the Interior); House Rep. No. 94-1589, 94th Cong., 2d Sess. 12-13 (1976) (same). By vesting the Secretary with express authority "to regulate boating and other water-related activities," therefore, "Congress would be clarifying its intent to invoke its powers under the Commerce Clause of the constitution . . . to assist in the administration of the Park System." Sen. Rep. No. 94-1190 at 11; House Rep. No. 94-1589 at 12–13.

The text of Public Law 94-458 also indicates that Congress intended to invoke, at least in part, its Commerce Clause authority. Congress included the phrase "water subject to the jurisdiction of the United States" twice in the relevant statutory section, once to define

the scope of the Secretary's authority, and a second time to describe the concurrent jurisdiction of the Coast Guard. As illustrated by a variety of laws including the Federal Boat Safety Act of 1971, Pub. L. 92-75, 85 Stat. 213 (Aug. 10, 1971), the Federal Boat Act of 1958, Pub. L. 85-911, 72 Stat. 1754 (Sept. 2, 1958), and the Motorboat Act of 1940, Pub. L. 76-484, 54 Stat. 163 (Apr. 25, 1940), Congress has indisputably delegated broad Commerce Clause authority to the Coast Guard to regulate vessels on *all* navigable waters of the United States, regardless of ownership. Yet Public Law 94-458 describes the reach of the Park Service's authority in the same terms as that of the Coast Guard's authority. The same phrase, in the same statutory section, should generally be ascribed the same meaning. *See Ratzlaf v. United States*, 510 U.S. 135, 143 (1994) ("A term appearing in several places in a statutory text is generally read the same way each time it appears."). Absent contrary indications (of which there are none), Public Law 94-458 therefore implies that the Park Service, like the Coast Guard, enjoys Commerce Clause authority over navigable waters within National Park System Units.

C. The Park Service had ample authority under Public Law 94-458 to issue the hovercraft regulation.

The Park Service properly exercised the authority delegated in Public Law 94-458 when it acted to ban "operation or use of hovercraft," 36 C.F.R. § 2.17(e), on "navigable waters and areas within their ordinary

reach . . . and without regard to the ownership of submerged lands, tidelands, or lowlands" within National Park System Units, *id.* § 1.2(a)(3). As noted above, Public Law 94-458 delegates authority to "prescribe regulations . . . concerning boating" within National Park System Units, including on any "waters subject to the jurisdiction of the United States." Pub. L. 94-458 § 2, codified at 54 U.S.C. § 100751(b). The precise definition of the term "waters subject to the jurisdiction of the United States" is subject to some debate, *see Rapanos v. United States*, 547 U.S. 715 (2006), but no definition of that term excludes *actually navigable waters* like the stretch of the Nation River at issue here. There can be no argument, therefore, that the Park Service overreached in banning hovercraft use on that river.

D. Nothing in ANILCA deprives the Park Service of its otherwise applicable authority to regulate boating on navigable waters that run through Alaska conservation lands.

Finally, nothing in section 103(c) of ANILCA deprives the Secretary of his otherwise applicable and properly delegated authority (1) to protect public lands from external threats, including water-based threats, and (2) to regulate the use of navigable waters within Park System Units. In relevant part, section 103(c) provides that "[n]o lands . . . conveyed to the State . . . shall be subject to regulations applicable solely to public lands within [Alaska conservation] units." But the

hovercraft ban applies "without regard to ownership" and is therefore, on its face, not "applicable solely to public lands." 16 U.S.C. § 3103(c). Thus, just as Alaska may not authorize use of a vessel on the Nation River (or on any other navigable waterway within the State) if that vessel does not comply with the Coast Guard's safety standards, the State may not authorize the use of a vessel within the Yukon-Charley Rivers National Preserve if that vessel does not comply with applicable Park Service regulations.

Importantly, this reading of section 103(c) does not deprive the provision of all meaning, because there are numerous Park Service regulations that *do* "appl[y] solely to public lands." Indeed, this is true of *most* Park Service's regulations. *See* 36 C.F.R. § 1.2(b) (subject to certain exceptions, including an express exception for the boating regulations, Park Service regulations "do not apply on non-federally owned land and waters").

For example, visitors to Alaska's conservation lands are generally authorized to camp and picnic, subject to limitations, but they may not "[l]eav[e] personal property longer than 4 months." *Id.* §§ 13.25, 13.26, 13.45. Furthermore, visitors to Yukon-Charley Rivers National Preserve must get a permit for commercial grazing, large political demonstrations, or subsistence tree harvest.[6] These rules and regulations do not authorize picnicking, camping, grazing, demonstrating,

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[6] *See* Yukon-Charley Rivers National Preserve Compendium §§ 2.10(a), 2.13(a)(13), 2.51, 2.60(a)(3), 13.485(a)(1) (Mar. 28, 2018), *available at* https://www.nps.gov/locations/alaska/upload/yuch-compendium-2018.pdf.

or subsistence tree harvesting on non-public lands, and they do not prohibit non-federal land owners within the conservation boundaries from storing possessions on their own property for longer than four months. *These* rules and regulations, in short, "apply solely to public lands," and could not lawfully be applied to property owned by Alaska under section 103(c). But Park Service regulations that apply to all navigable waters within Park System Units, including the hovercraft ban, are expressly among the exceptions to this general limitation. *Id.* § 1.2(a)-(b).[7]

Thus, section 103(c) recognizes two categories of federal regulations: those that apply only to federal property, and those that apply to all property, irrespective of ownership. The first category, which includes the camping regulation described above, is "solely applicable to public lands" and is therefore inapplicable on non-federal lands within a conservation boundary. The second category, which includes the hovercraft ban, is applicable to all property—whether owned by the state, a private individual, or the United States—that lies within a conservation boundary.

Any other reading of section 103(c) would wreak havoc, not only in Alaska but nationwide. Construing the hovercraft regulation as a regulation "solely applicable to public lands" under section 103(c) would

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[7] The Park Service amended § 1.2 in 1996 specifically to eliminate any doubt that its regulations applied to "non-federally owned . . . waters," and to ensure that "an ordinary person" would have a "reasonable opportunity to know when regulations apply." 61 Fed. Reg. 35,133, 35,134 (July 5, 1996).

render the regulation inapplicable not only on state-owned waters within the Alaska conservation lands but also on non-federal waters within other National Park System Units. Such a holding would, in turn, leave conservation lands around the country vulnerable to inappropriate and intensive activities on any waterways of mixed or unclear ownership, thereby significantly impairing the conservation values for which the lands were designated. *See, e.g., Free Enters. Canoe Renters Ass'n of Mo.*, 711 F.2d at 856 (upholding National Park Service authority to prohibit activities associated with the commercial rental of canoes within the boundaries of the Ozark National Scenic Riverways); *Block*, 660 F.2d at 1249–50. Such a ruling could also call into question other regulatory regimes designed to protect public lands from external threats, such as limits on hunting near wildlife refuges or disposing of solid waste within the boundaries of National Park System Units. *See, e.g., High Point*, 850 F.3d at 1189; *Dunn-McCampbell Royalty Interest*, 630 F.3d at 442; *Stephenson*, 29 F.3d at 163–64.

III. WHATEVER SECTION 103(C) MEANS, IT DOES NOT PERMIT ALASKA TO AUTHORIZE USES OF WATERWAYS WITHIN CONSERVATION AREAS IF THOSE USES CONFLICT WITH PARK SERVICE REGULATIONS.

Petitioner and Alaska's reading of section 103(c) is also inconsistent with the broad framework and structure of ANILCA, including the Act's express intent to

protect specific waterways and water resources, and its careful efforts to balance national conservation interests with state, tribal, and local interests particular to Alaska.

Throughout ANILCA, Congress expressed its intention to protect waterways and their resources within the boundaries of the Alaska conservation areas. For example, the purposes of the statute include "to protect and preserve . . . rivers . . . and related recreational opportunities including . . . canoeing [and] fishing . . . on freeflowing rivers." Pub. L. 96-487 § 101, codified at 16 U.S.C. § 3101. Seven of the ten newly designated conservation areas identify waterways and their protection as integral components. Yukon-Charley Rivers National Preserve, for instance, was designated to "maintain the environmental integrity of the entire Charley River basin, including streams, lakes, and other natural features, in its undeveloped natural condition." *Id.* § 201(10), codified at 16 U.S.C. § 431 note. Aniakchak National Monument maintains a "caldera . . . the Aniakchak River and other lakes and streams, in their natural state." *Id.* § 201(1). Gates of the Arctic National Park "maintain[s] the wild and undeveloped character of the area, including opportunities for visitors to experience solitude, and scenic beauty of the . . . rivers [and] lakes." *Id.* § 201(4)(a). Kobuk Valley National Park "maintains the environmental integrity of the natural features of the Kobuk River Valley, including the Kobuk, Salmon, and other rivers . . . in an undeveloped state." *Id.* § 201(6). Lake Clark National Park "maintain[s] unimpaired the

scenic beauty and quality of portions of the Alaska Range and the Aleutian Range, including . . . wild rivers, lakes, [and] waterfalls." *Id.* § 201(7)(a). Noatak National Preserve "maintain[s] the environmental integrity of the Noatak River." *Id.* § 201(8)(a). And Wrangell-Saint Elias National Park "maintain[s] unimpaired the scenic beauty and quality of . . . lakes, and streams." *Id.* § 201(9). Finally, Congress also referenced protection of waterways as a purpose of expanding Glacier Bay National Monument and Katmai National Monument. *Id.* § 201(1)-(2).

These numerous indications that Congress intended ANILCA to protect the rivers and streams within Alaska conservation lands are entirely inconsistent with the contention that a solitary sentence in the more than 175 pages that make up the Act, *see* 94 Stat. 2371-551 (Dec. 2, 1989), hidden in a provision entitled "MAPS," grants the State authority to permit (or to restrict) any use of those waterways, no matter how destructive or intensive the permitted uses (or how integral to the Park Service's conservation or navigation activities).

Alaska's interpretation would also upend the careful balance that ANILCA strikes between conservation and other uses of these unique Alaska lands. ANILCA section 1110, for example, addresses access issues, authorizing the use of various forms of transportation, including motorboats, "for traditional activities . . . and for travel to and from villages and homesites," but only subject to "reasonable regulations." 16 U.S.C § 3170(a)-(b). The section also guarantees non-federal property

owners "adequate and feasible access" across conservation areas. *Id.* In other words, Congress struck a compromise: waterways within conservation areas may be used for certain transportation purposes, but only subject to regulation to protect the purposes for which conservation areas were designated. Alaska's reading of section 103(c) would deprive the federal government of its authority over such transportation uses and thwart Congress's manifest intention to balance federal, state, tribal, and private interests.

Moreover, section 1110 is only one of many statutory compromises that Alaska's reading of ANILCA would distort. As this Court previously recognized, the Act "carves out numerous Alaska-specific exceptions to the Park Service's general authority over federally managed preservation areas," *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016), but every one of those statutory exceptions is specific, tailored, and balanced. Section 304, for example, allows commercial fishing within wildlife refuges, and "the use of Federal lands, for campsites, cabins, motorized vehicles, and aircraft landing directly incident" to commercial fishing, but the section makes clear that such uses are "subject to reasonable regulation." Pub. L. 96-487 § 304, 94 Stat. 2393.[8] Likewise, section 205 prohibits the Secretary from taking "action to restrict *unreasonably* the exercise of valid commercial fishing rights or privileges," including attendant uses of public lands, within specific conservation lands managed by the Park Service.

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[8] This provision of ANILCA does not appear to have been codified into the U.S. Code.

Id. § 205, codified at 16 U.S.C. § 410hh-4 (emphasis added). Section 811 guarantees "*reasonable* access to subsistence resources on the public lands" and authorizes "*appropriate* use for subsistence purposes of snowmobiles, motorboats, and other means of surface transportation . . . , *subject to reasonable regulation*." *Id.* § 3121(b), codified at 16 U.S.C. § 3121(b) (emphasis added). Finally, section 1313, which permits sports hunting and fishing in conservation lands designated as Alaskan National Preserves, authorizes the Secretary to "designate zones where and periods when no hunting, fishing, trapping, or entry may be permitted for reasons of public safety, administration, floral and faunal protection, or public use and enjoyment." *Id.* § 1313, codified at 16 U.S.C. § 3201.

None of these exceptions is unlimited, and each recognizes the authority of the relevant federal land manager to regulate the allowed uses to protect the conservation values of the surrounding conservation lands. In short, Congress balanced local conditions and needs with the national interest in protecting Alaska conservation lands. In no case did that balance tilt fully in favor of Alaska, as the State now claims.

Moreover, Petitioner and Alaska's interpretation of section 103(c) would render the Park Service powerless to effectuate ANILCA's fundamental conservation purposes. While the facts before the court involve a solitary hunter using a hovercraft, under Petitioner and Alaska's interpretation the Park Service would lack authority to limit commercial fishing, to restrict the use of party barges, oil tankers, or drilling rigs, or to

regulate any other use of navigable waters within the Alaska conservation lands. Such an outcome would upset ANILCA's careful balance of local, state, tribal, and federal interests in Alaska's unique conservation areas. This Court should not read section 103(c)'s spare and opaque language to so significantly alter ANILCA's broader statutory scheme. *Cf. Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001) (noting that Congress does not "hide elephants in mouseholes").

CONCLUSION

This case is straightforward. The protection of public lands and the regulation of navigable waters are traditional domains of federal sovereignty. Congress directed the Park Service to regulate navigable waters within National Park System Units. The Park Service exercised that authority to ban use of hovercrafts, and that ban applied to Petitioner. The Court need look no further to affirm the lower court's judgement in favor of the federal defendants.

Petitioner and Alaska argue that the Park Service lacks jurisdiction over Alaska's rivers for two reasons, each of which is untenable: a novel assertion that the state owns the molecules of water flowing through navigable rivers, and a reading of ANILCA section 103(c) that strains the text, would undermine numerous other provisions of the statute, and would upset Park Service regulation of navigable waters elsewhere in

the country. The Court should reject these arguments and their sweeping and absurd implications, and instead uphold the Park Service's authority to regulate navigable waters that run through federal public lands within National Park System Units in Alaska.

Respectfully submitted,

JUSTIN R. PIDOT
Counsel of Record
Visiting Professor
UNIVERSITY OF COLORADO
LAW SCHOOL
Professor of Law
UNIVERSITY OF DENVER
STURM COLLEGE OF LAW
2255 East Evans Ave.
Denver, CO 80208
Tel: (303) 871-6168
Fax: (303) 871-6378
jpidot@law.du.edu

AMANDA C. LEITER
Professor of Law
AMERICAN UNIVERSITY
WASHINGTON COLLEGE
OF LAW

MICHAEL PAPPAS
Professor of Law
UNIVERSITY OF MARYLAND
CAREY SCHOOL OF LAW

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